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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

SYVASKY L. POYNER,

*Petitioner,*

v.

TONI V. BAIR,

*Respondent.*

## REPLY BRIEF IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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## TABLE OF CONTENTS

TABLE OF CITATIONS . . . . . ii

STATUTORY PROVISIONS . . . . . iii

REPLY BRIEF . . . . . 2

CONCLUSION . . . . . 10

## TABLE OF CITATIONS


| | PAGE |
|---|---|
| Bland v. Johnson, 495 F. Supp. 735 (E.D. Va. 1980) | 6 |
| Brooks v. Peyton, 210 Va. 318, 171 S.E.2d 243 (1969) | 2 |
| Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970) | 2, 5, 6, 7 |
| Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, 419 U.S. 1108 (1975) | 3, 7-10 |


### STATUTES


Va. Code § 8.01-663 . . . . 5

## STATUTORY PROVISIONS

§8.01-663. Judgment Conclusive.
Any such judgment entered of record shall be conclusive, unless the same be reversed, except that the petitioner shall not be precluded from bringing the same matter in question in an action for false imprisonment.
(Code 1950, § 8-605; 1977, c. 617).

## REPLY BRIEF

Respondent opposes certiorari review by stating that this Court lacks jurisdiction because no federal question "was entertained" in the state habeas corpus proceeding below. Respondent's argument is a ruse to avoid consideration of the constitutional violations apparent in the way Mr. Poyner's confession was obtained and used against him.

Respondent's argument is that in Virginia, the writ of habeas corpus is no longer available to remedy constitutional error if (i) the error was raised at trial or on direct appeal, citing Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970); Brooks v. Peyton, 210 Va. 318, 171 S.E.2d 243 (1969), or (ii) the error was not raised at trial or on

direct appeal, citing Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, 419 U.S. 1108 (1975). Respondent essentially argues that principles of collateral estoppel and res judicata apply to habeas corpus petitions.[1] The conclusion of

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[1]Respondent's Brief also inaccurately asserts that questions II, III and V as stated in the Petitions for Certiorari were raised at trial and on direct appeal and found meritless by the Virginia Supreme Court. Mr. Poyner's Petitions for Certiorari concern three trials, in three Virginia courts (Hampton, Williamsburg, and Newport News), and three direct appeals, each handled by different counsel. Examination of trial counsels' Motions to Suppress the Confession, transcripts of the Motion hearings and the appellate briefs shows that questions II, III and V were not articulated in every case; rather, the reasons advanced at various stages for suppressing the confession were vague and mixed. On direct appeal, the Virginia Supreme Court found that the confession was admissable because

(Footnote Continued)

Respondent's theory is that Mr. Poyner can assert only one claim in a habeas corpus petition - ineffective assistance of counsel.

Respondent's expansive interpretation of Virginia law strips the habeas corpus writ of any usefulness except in prosecuting the right to counsel. Virginia's Supreme Court has

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(Footnote Continued)
(1) Poyner's statement was not a request for counsel, 229 Va. at 410-411 (Hampton appeal and Newport News appeal); (2) Poyner initiated further communication with the interrogating detectives, 229 Va. at 411 (Hampton appeal); (3) Poyner's will was not overborne so that his statement was "voluntary", 229 Va. at 411 (Newport News appeal); and (4) the written warning given to Poyner before the videotape session rendered the confession "constitutionally sufficient" even if a prior warning had been defective, 229 Va. at 408 (Williamsburg appeal).

never confined habeas corpus petitions to this limited role.

Virginia law expressly authorizes the litigation of constitutional claims in a habeas corpus action, although repetitious petitions may be dismissed summarily. Va. Code § 8.01-663 provides that "[a]ny such judgment entered of record [after hearing on the habeas corpus petition] shall be conclusive . . . except that the petitioner shall not be precluded from bringing the same matter in question in an action for false imprisonment." In Hawks v. Cox, the Virginia Supreme Court applied the predecessor statute to Va. Code § 8.01-663 to bar repetitive habeas corpus petitions, but expressly rejected the Attorney General's suggestion that res judicata should apply. The Court

considered Hawks' petition an abuse and a frivolity -- his earlier petitions for the Great Writ had been resolved by state and federal courts, and his case at bar stated nothing new. Accord Bland v. Johnson, 495 F. Supp. 735 (E.D. Va. 1980)(characterizing Hawks as a "writ-writer"). Hawks did not appeal his conviction; he litigated through successive habeas corpus petitions in the state and federal courts. Mr. Poyner has filed only one habeas corpus petition in each jurisdiction where he was convicted and sentenced to death.

The precise ruling of Hawks v. Cox was that when a court determines that a habeas corpus petition is repetitious, and adds nothing new to a prior adjudicated habeas corpus petition, the court can dismiss the petition, without

appointing counsel, under Va. Code § 8.01-663. In Hawks v. Cox the Court expressly stated that it would not modify the common law rule that principles of res judicata do not apply in a habeas corpus proceeding. 211 Va. at 95, 175 S.E.2d at 274. The Court did not hold, as stated by Respondent, that "repetitious claims previously adjudicated in state or federal court [are] not cognizable in Virginia habeas corpus." (Respondent's Brief at 2).

Likewise in Slayton v. Parrigan the Virginia Supreme Court did not hold that "claims not raised at trial and on appeal are not cognizable in Virginia habeas corpus." (Respondent's Brief at 2). In Slayton v. Parrigan, the Court applied the familiar rule of evidence whereby petitioner's failure to object

to identification evidence at trial resulted in a loss of the objection. Slayton first raised allegations that a pretrial identification procedure was illegal during an evidentiary hearing on his habeas corpus petition. 215 Va. at 28; 205 S.E.2d at 681. Because Slayton did not attack the pretrial identification procedure at trial, Slayton lacked standing to make that attack in a habeas corpus proceeding.[2] To allow a prisoner to challenge evidence

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[2] The Virginia Supreme Court stated: "[t]he sole issue on this appeal is whether the petitioner has standing in a habeas corpus proceeding to attack an alleged impermissibly suggestive pretrial identification as tainting the in-court identification when he did not present that defense at his criminal trial and upon appeal from that conviction." 215 Va. at 28; 205 S.E.2d at 681.

for the first time in a habeas corpus proceeding would "circumvent the trial and appellate processes." Id. at 30; 205 S.E.2d at 682.

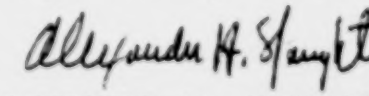
Here, Mr. Poyner did challenge the confession evidence at trial; he moved to suppress it before each of three trials. Unlike Slayton, Poyner created an undisputed facutal record with respect to the alleged violations of his 5th and 14th Amendment rights. For example, the record shows that the interrogating detectives interpreted Poyner's statement ("Didn't you say I had the right to an attorney") as a request for counsel. This conforms to the Virginia Supreme Court's view in Slayton v. Parrigan that "[t]he trial and appellate procedures in Virginia are adequate in meeting procedural

requirements to adjudicate state and federal constitutional rights and to supply a suitable record for possible habeas corpus review." 215 Va. at 30; 205 S.E.2d at 682 (emphasis added). The issue in the habeas corpus action for which Poyner seeks certiorari review was whether that record revealed constitutional error; there was no issue as to whether Mr. Poyner had preserved his objection to the confession evidence.

## CONCLUSION

Petitioner respectfully asks that this Court grant the Petitions for Writs of Certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Alexander H. Slaughter, certify that I mailed first class, postage prepaid, three (3) copies of this Reply Brief in Support of Petitions for a Writ of Certiorari to Richard B. Smith, Assistant Attorney General, Supreme Court Building, 101 North 8th Street, Richmond, Virginia 23219, counsel of record for respondent below, on this the 13th day of September, 1988.

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